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APPLICATION NUMBER	FILING DATE	FIRST NAMED APPLICANT	ATTY. DOCKET NO.
08/812,865	03/06/97	TAYLOR	

12M2/0109

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EXAMINER	
ROBINSON, A	#6
ART UNIT	PAPER NUMBER
1209	

DATE MAILED: 01/09/98

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

OFFICE ACTION SUMMARY

☐ Responsive to communication(s) filed on _____

☐ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 D.C. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

Disposition of Claims

☒ Claim(s) 1-13 is/are pending in the application.
Of the above, claim(s) _____ is/are withdrawn from consideration.
☐ Claim(s) _____ is/are allowed.
☒ Claim(s) 1-13 is/are rejected.
☐ Claim(s) _____ is/are objected to.
☐ Claim(s) _____ are subject to restriction or election requirement.

Application Papers

☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.
☐ The specification is objected to by the Examiner.
☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been

☐ received.
☐ received in Application No. (Series Code/Serial Number) _____.
☒ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

☐ Notice of Reference Cited, PTO-892
☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 6 (3 Sheets)
☐ Interview Summary, PTO-413
☐ Notice of Draftperson's Patent Drawing Review, PTO-948
☐ Notice of Informal Patent Application, PTO-152

--SEE OFFICE ACTION ON THE FOLLOWING PAGES--

* U.S. GPO: 1998-404-496/____

The status of SN: 08/705,594, filed 8-30-96 should be indicated in the specification.

Claims 1-13 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 1-13 are rejected on the ground of undue multiplicity. Claims 1 and 10 fail to differ in scope. The term "K_2HPO," (claim 1, line 3) should apparently be "K_2HPO_3,". Correction is requested. Claim 7 is indefinite in failing to set forth proper Markush language. The expression "fungicidal/fertilizer" (claim 11, line 1) is improper. Correction is requested.

Claim 11 is rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for inorganic salts, does not reasonably provide enablement for organic salts. The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to use the invention commensurate in scope with these claims. The specification fails to set forth any useable organic salts.

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Claims 1-6, 10, 12 and 13 are provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 1-6 of copending Application No. 08/705,594. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(f) or (g) prior art under 35 U.S.C. 103(a).

Claims 7-9 and 11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Widdowson et al (AX), Lovatt (AA), Lovatt (AZ) and Parham Jr. (AV). The Lovatt (AZ) reference teaches that both phosphate and phosphite salts are known fertilizers which may be applied through the soil or foliar application. The Widdowson et al, Lovatt (AA) and Parham Jr. references teach that inorganic and organic phosphate salts are old and known fertilizers. The

above references fail to teach specific examples of the old fertilizers together. However, one skilled in this art would find ample motivation from the prior art supra to combine the well known fertilizers together, of known properties where the results obtained thereby are no more than the additive effects of the ingredients; particularly since the above prior art teaches the combination of known fertilizers. In re Sussman, 1943 C.D. 518. The data in the specification is noted, but does not show unexpected and/or unobvious results for all the compounds and all the broad ranges claimed.

References AB-AU, AW,AY and AA' - AE' are cited to show the state of the art.

Robinson/dc
January 7, 1998

ALLEN J. ROBINSON
PRIMARY EXAMINER
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